FILE COPY

Office-Supreme Court, U.S.
FILED

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	15

CITATIONS

Cases:

Bakelite Corp., Ex parte, 279 U.S. 438 — 13
Borak v. *United States*, 78 F. Supp. 123 — 14
Burns v. *Wilson*, 346 U.S. 137 — 14
Carter v. *McClaughry*, 183 U.S. 365 — 13
Fowler v. *Wilkinson*, 353 U.S. 583 — 13
French v. *Weeks*, 259 U.S. 326 — 10
Gordon v. *United States*, 117 U.S. 697 — 13
Hegler v. *Faulkner*, 153 U.S. 109 — 10
Henry v. *Hodges*, 171 F. 2d 401 — 11
Hiatt v. *Brown*, 339 U.S. 103 — 11, 13
Kaufman v. *United States*, 93 F. Supp. 1019 — 14
Mistretta v. *United States*, 128 C. Cls. 41 — 14
Moss v. *Hunter*, 167 F. 2d 683 — 12
Sherman v. *United States*, 241 F. 2d 329 — 12
62 Cases of Jam v. *United States* 340 U.S. 593 — 9
United States v. *Gallagher*, 183 F. 2d 342, certiorari denied, 340 U.S. 913 — 14
United States v. *Great Northern R. Co.*, 343 U.S. 562 — 9
Whelchel v. *McDonald*, 340 U.S. 122 — 14
Williams v. *United States*, 218 F. 2d 276 — 12

Constitution and Statutes:

Articles of War, 1920, 41 Stat. 787, 10 U.S.C. 1472, *et seq.* (1940 ed.):

Article 8 — 8, 17
Article 17 — 12, 17
Article 64 — 18

Constitution and Statutes—Continued
Page
Articles of War 72 and 73 (Rev. Stat., 2d ed. 1878, p. 237) 9
R.S. 1228, 10 U.S.C. 579 (1946 ed) (repealed May 5, 1950, 64 Stat. 147) 6
Uniform Code of Military Justice (1950), Art. 1(6), 64 Stat. 108 9
Uniform Code of Military Justice (1956), Art. 1(5) 10 U.S.C. 801(5) 9
28 U.S.C. 1492 7
28 U.S.C. (Supp. IV) 2501 14
28 U.S.C. 2509 7
United States Constitution:
Fifth Amendment 11
Sixth Amendment 11
Miscellaneous:
A.R. 140–5, July 1, 1941 6
102 Cong. Rec. (pt. 4) 4997, 5509 7
Manual for Courts-Martial (1928 ed), paras. 133, 134 9
S. Res. 233, 84th Cong., 2d Sess., referring S. 98, "A Bill for the Relief of Marion G. Denton" 7
War Department Technical Manual TM 27–255, *Military Justice Procedure*, para 53a 9, 18
Winthrop, *Military Law and Precedents* (2d ed.), p. 570 9

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 180

MARION G. DENTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 63; Pet. App. A1–A60) is not yet reported. The order of the Court of Claims overruling petitioner's motion for a new trial (R. 112; Pet. App. A61) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely motion for a new trial was overruled on April 8, 1959. The petition for a writ of certiorari was filed on July 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the court-martial tribunal which tried, convicted, and sentenced petitioner had been appointed in compliance with Article 8 of the Articles of War and, consequently, was not lacking in jurisdiction.

2. Whether petitioner, who was competently defended at his court-martial by two assigned military counsel, was denied his constitutional rights because his defense was not conducted by the military counsel whom he had requested, that officer being unavailable.

3. Whether a civil court has the power to review the sufficiency of the evidence adduced in a court-martial where the court-martial had jurisdiction over the accused and the offense, and protected the constitutional rights of the accused.

STATUTES INVOLVED

The 1920 Articles of War and War Department regulation discussed herein are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

On 1941, petitioner, a major in the Air Corps Reserve, entered on an extended tour of active duty with the Army. He was rated as a military pilot (R. 88).

In 1943, the United States military establishment included the Greenland Base Command, an independent overseas command which consisted of three major posts and twenty-two lesser installations located on Greenland (R. 88). The three major posts had the code names of BW–1, BE–2, and BW–8 (R. 88).

Each of these posts had its own post commander, but BW–1 also served as headquarters for the base command and its commanding officer, Colonel Robert W. C. Wimsatt (R. 89). In January 1943, Colonel Wimsatt notified the War Department that he needed the services of two Air Corps officers with pilots' ratings, one in the grade of major and one in the grade of lieutenant colonel, to serve as post commanders of flying fields in the Greenland Base Command (R. 90). As the War Department did not respond to Colonel Wimsatt's request for some months, he repeated it several times (R. 90).

On June 9, 1943, petitioner received orders assigning him as "Post Commander of the Greenland Base Command" (R. 91). In accordance with his orders petitioner proceeded to the flying field at Presque Isle, Maine. The personnel at the field were somewhat uncertain as to where petitioner's orders required him to be transported, but he was finally advised that "The War Department wants you to go to BW–1" (R. 92). Petitioner was flown to BW–1 and, shortly after his arrival, was introduced to Colonel Wimsatt. Colonel Wimsatt explained to petitioner that he was Commanding Officer of the Base Command and that the command consisted of several posts (R. 93). The colonel told petitioner of his request to the War Department for the services of an Air Force major with a pilot's rating to become Post Commander of BE–2, and expressed his understanding that petitioner had been sent to the Greenland Base Command in response to this request (R. 93). During the course of this conversation, peti-

tioner indicated to the colonel that he wanted to keep in close communication with his business in Florida (R. 93). The colonel pointed out that this would not be possible as the mail service in Greenland was irregular and radio communication could only be used for official messages (R. 93).

On June 23, 1943, Colonel Wimsatt was informed by radio that the acting post commander of BE-2, which lay 500 miles north of and across the ice cap from BW-1, was ill and urgently needed medical treatment at the Base Hospital, which was located at BW-1 (R. 94). The colonel instructed his adjutant to inform petitioner that he should proceed to BE-2 by a waiting airplane, for the purpose of relieving the ill man and assuming command (R. 94). The adjutant, in turn, instructed Lieutenant Manley to transmit the message to petitioner (R. 94).

When Lieutenant Manley informed petitioner of the colonel's order, petitioner declared that he did not plan to go anywhere (R. 95). Colonel Wimsatt went to see petitioner, explained to petitioner the emergency which had arisen, and ordered petitioner to proceed to BE-2 (R. 95). Petitioner responded that he would prefer to be considered unfit for duty (R. 95). Colonel Wimsatt then told petitioner to either obey the order or be tried (by courtmartial) (R. 95). Petitioner replied, "Then sir, I suggest that you try me" (R. 95).

On June 25, 1943, Colonel Wimsatt informed the War Department that he was preferring charges against petitioner under Article 64 of the Articles of War (*infra*, p. 16) (R. 96). The War Depart-

ment, acting through the Office of the Judge Advocate General of the Army, forwarded the charges to the Commanding General of the First Air Force at Mitchel Field, New York, for trial by a general court-martial (R. 98).

Shortly after his arrest, petitioner wrote a letter to Captain John Conway Cook, a member of the Army Judge Advocate General's staff, asking Cook to undertake his defense (R. 97). Captain Cook agreed and the Office of the Judge Advocate General was informed that Captain Cook's commanding officer expected, but could not guarantee, that he would be available on September 20, 1943 (R. 99). After the trial was set for September 23, 1943, at Mitchel Field, information was received that Cook could not leave his station at Maxwell Field, Alabama, until September 24th (R. 101). Petitioner's court-martial was then postponed until September 27th because of Cook's unavailability (R. 101). Petitioner, however, was advised that Cook could not be available on the later date (R. 101).

At his trial, which began on September 27th, petitioner was defended by Colonel Gregory F. Keenan and Captain Adolph J. Eckhardt (R. 103). Captain Eckhardt, who principally conducted the defense (R. 103), was a licensed attorney with extensive court-martial experience (R. 99). Petitioner was also detailed, at his request, the assistance of Lieutenant Colonel Donald B. Brummel (R. 102).

The court-martial found petitioner guilty of the charge, and sentenced him to dishonorable dismissal, forfeiture of pay and allowances, and confinement at

hard labor for twelve years (R. 103). The sentence was approved by the Commanding General of the First Air Force (R. 103) and by a Board of Review (R. 104). The Judge Advocate General and the Under Secretary of War concurred, pointing out that, although the order transferring petitioner to Greenland had been unskillfully drawn, it had contained no real ambiguity (R. 104). They did, however, recommend that the period of confinement be reduced to three years (R. 104). The President confirmed petitioner's sentence, except that the forfeitures and confinement were remitted, and on August 19, 1944, the sentence, as modified, was carried out (R. 105).[1]

In May 1952, petitioner asked the Judge Advocate General of the Air Force for a new trial, but after a hearing the latter refused to vacate petitioner's sentence (R. 110). In 1953, petitioner applied to the Department of the Air Force for the correction of

---

[1] On October 4, 1956, petitioner was offered a commission in the Air Force Reserve which he declined to accept (R. 108). The nature of this commission was unusual in that it was for the expressed purpose of enabling petitioner to serve for one week so that he could be discharged under honorable conditions. The communications from the War Department to petitioner offering him this commission made no reference to petitioner's existing dishonorable discharge. Compare R.S. 1228, 10 U.S.C. 579 (1946 ed.) (repealed May 5, 1950, 64 Stat. 147) which provided: "No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, *except by a reappointment confirmed by the Senate*" (emphasis supplied). See also A.R. 140–5, July 1, 1941, which lists as ineligible for reserve commissions "in all cases those officers separated from the Army as a result of their own misconduct."

his record concerning the court-martial conviction (R. 111). The Air Force Board for the Correction of Military Records found, however, that petitioner had not established a sufficient basis for the granting of a hearing by the board (R. 111).

On August 31, 1950, petitioner brought suit against the United States in the Court of Claims. He alleged that the sentence of the court-martial had been invalid and prayed for a sum of money representing the pay and allowances which he was allegedly entitled to receive, but had not received, as a major in the Army for the period from August 19, 1944, to the date of judgment (R. 63). While this case (No. 49800) was pending, the Senate passed Resolution 233, 84th Congress, 2d Session, referring S. 98, "A Bill for the Relief of Marion G. Denton," to the Court of Claims. See 28 U.S.C. 1492 and 2509.[2] The petition in the Congressional reference case was filed on June 27, 1956, and the two cases were consolidated for trial.

The cases were referred to a commissioner. The commissioner submitted findings of fact and an opinion recommending that Case No. 49800 be dismissed, and that Congress be advised that petitioner did not have a valid claim, legal or equitable, against the United States (R. 61). The Court of Claims ac-

[2] The resolution directed the court to proceed and to report to the Senate, "giving such findings of fact and conclusions thereon as shall be sufficient to inform the Congress of the nature and character of the demand, as a claim legal or equitable, against the United States, and the amount, if any, legally or equitably due from the United States to the claimant." See 102 Cong. Rec. (pt. 1) 4997, 5509.

cepted his recommendation and entered judgment accordingly (R. 65). Petitioner's motion for a new trial was denied (R. 112).

ARGUMENT

1. Petitioner alleges (Pet. 11, 22) that the court-martial tribunal lacked jurisdiction in that its members had not been properly appointed. This claim is, as the court below (R. 65) and the commissioner both found (R. 32), erroneous.

Article 8 of the 1920 Articles of War (*infra*, p. 15), which were applicable at the time of petitioner's trial, provided that, where a commander is the accuser of the person to be tried, "the court shall be appointed by superior competent authority". Since Colonel Wimsatt, as petitioner's accuser, could not appoint the court for petitioner's trial, he forwarded the charges against petitioner to the War Department (to whom, as commander of an independent overseas command, the colonel was directly responsible (R. 78)). The War Department referred the charges to the Commanding General of the First Air Force, Major General Ralph Royce, who convened the court.

Petitioner argues in effect (Pet. 11, 12–13) that "superior competent authority" in Article 8 must be construed as though it read "superior competent authority in the chain of command above the accusing commander." Since, by the terms of Article 8, the President was the only competent authority in the chain of command above Colonel Wimsatt, according to petitioner's construction only the President had the authority to convene his court-martial. It is clear, however, that "superior" in the military con-

text refers, as the commissioner pointed out (R. 81), to a person who has either superiority in command or superiority in rank with respect to another. See Winthrop, *Military Law and Precedents* (2d ed.), p. 570; *Manual for Courts-Martial* (1928 ed.), paras. 133, 134; cf. Uniform Code of Military Justice (1950), Art. 1(6), 64 Stat. 108; Uniform Code of Military Justice (1956), Art. 1(5), 10 U.S.C. 801(5).[3]

Petitioner's attempt to engraft a qualification onto the clear terms of a statute violates the general rules of statutory construction. Cf. *62 Cases of Jam* v. *United States*, 340 U.S. 593; *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 575. Moreover, his interpretation is irreconcilable with the background of the specific provision in question. Articles of War 72 and 73 (Rev. Stat., 2d ed., 1878, p. 237), the predecessors of Article 8, provided that where the commander of a territorial division, army or department was the accuser, "the court shall be appointed by the President" and where, in time of war, the commander of a division or brigade was the accuser, "the court shall be appointed by the next higher commander." As the commissioner found (R. 81), the change in phraseology to "superior competent authority" must have been intended to discard the concept of chain of command which was contained in the words "next

[3] Paragraph 73a of the War Department Technical Manual TM 27-255, *Military Justice Procedure* (*infra*, p. 16-17), which petitioner cites (Pet. 14), merely sets forth an example in which a general court-martial is convened by an officer who is superior in the chain of command to the accusing officer. Certainly, this example cannot be viewed as an attempt to confine the meaning of the statute to the chain of command.

higher commander." Since Major General Royce was obviously superior in rank to Colonel Wimsatt, and since as Commanding General of the First Air Force he was competent, under the terms of Article 8 (*infra*, p. 15) to convene a general court-martial, it is clear that the court-martial had jurisdiction.

While not disagreeing with the analysis of the commissioner, the Court of Claims pointed out that duties similar to that involved here, which have been entrusted to the President, may properly be performed by the head of the relevant executive department (R. 64). See *Hegler* v. *Faulkner*, 153 U.S. 109. Thus, where a statute does not require personal action by the President, a function concerning the military which has been entrusted to him may be discharged by the Secretary of War. Cf. *French* v. *Weeks*, 259 U.S. 326. Here, the court which tried petitioner was convened by the Commanding General of the First Air Force under instructions which were "By order of the Secretary of War." As the Court of Claims stated (R. 64), if the President had "appointed" the court, he would quite certainly not have done it himself, but would have relied on the Secretary of War.

2. At his court-martial, petitioner was represented by two assigned counsel (R. 103), one of whom was Captain Adolph J. Eckhardt, a member of the New York bar who had previously acted as defense counsel in many courts-martial (R. 99). Captain Eckhardt was the person principally active in the conduct of

---

The legislative history of the statutory change is not dispositive, however, in ascertaining its purpose.

petitioner's defense (R. 103).[3] In addition to his two assigned counsel, petitioner was also assigned, at his request, the services of Lieutenant Colonel Donald B. Brummel (R. 102). Yet, now petitioner claims (Pet. 17, 22) that he was denied his right to counsel under the Fifth and Sixth Amendments because he was not represented by Captain John Cook, whose services he had requested.

Captain Cook, however, was not available at the time of trial. On or about September 20, 1943, petitioner was advised by the Headquarters of the First Air Force that Captain Cook would be unavailable to participate in petitioner's defense on the basis of information which presumably came from Captain Cook's commanding officer (R. 101). During the time that the trial took place in New York, Captain Cook was in fact occupied in the performance of his regular duties in Alabama (R. 102). Since, as Judge Learned Hand stated in *Henry* v. *Hodges*, 171 F. 2d 401, 403 (C.A. 2), the question whether a military man is "available" "demands a balance between the conflicting demands upon the service, and * * * must be determined on the spot," the decision lies largely within the discretion of his military superiors. See *Hiatt* v. *Brown*, 339 U.S. 103, 108. Certainly there is nothing to indicate in this case that the finding of unavailability made by the military, and accepted by the

[3] Despite this fact, which petitioner does not deny, he directs his argument entirely to the "inexperience" and "reluctance" of Lieutenant Colonel Keenan, without mentioning Captain Eckhardt (Pet. 15, 17). But even as to Lieutenant Colonel Keenan, petitioner has produced no proof indicating that that officer was not competent (R. 103).

commissioner and the Court of Claims, was so arbitrary and unreasonable as to constitute an abuse of discretion.

Petitioner does not claim either that he did not have the effective assistance of counsel or that his counsel did not have sufficient time to prepare his case properly. Instead, petitioner's sole contention is that, although having been given a reasonable opportunity to procure counsel of his own selection (R. 100), the particular officer whom he chose was not able to be present at his trial (R. 101). A defendant's constitutional right, however, to the effective assistance of counsel is not violated merely because the counsel of his choice was unavailable to represent him at the trial. Otherwise, trials would be delayed indefinitely whenever counsel preferred by the defendant could not be present. Here, petitioner's constitutional rights were fully protected by the assignment of qualified counsel who appeared and advised with him and who, so far as the record indicates, defended him conscientiously and competently. See *Sherman* v. *United States*, 241 F. 2d 329, 336 (C.A. 9); *Williams* v. *United States*, 218 F. 2d 276, 279 (C.A. 4); *Moss* v. *Hunter*, 167 F. 2d 683, 684 (C.A. 10). Similarly, petitioner was not deprived of any of his rights under Article 17 of the Articles of War (*infra*, pp. 15–16), since that Article guarantees an accused the right to military counsel of his own selection only "if such counsel be reasonably available."

3. The commissioner and the Court of Claims inquired into the sufficiency of the evidence underlying petitioner's court-martial conviction solely for the

purpose of giving advice to the Senate respecting any equitable considerations which that body might want to consider in passing on petitioner's private relief bill (R. 68). In so doing, the commissioner and the court agreed with the court-martial's determination that petitioner had no valid justification for refusing to carry out the command (R. 77). But these advisory findings are, of course, not reviewable by this Court. *Ex parte Bakelite Corp.*, 279 U.S. 438; *Gordon v. United States*, 117 U.S. 697. Nevertheless, petitioner asks (Pet. 17–23) the Court to review the evidence adduced in his court-martial and asserts that the Court of Claims erred in holding that, in the exercise of its regular judicial jurisdiction, it did not have the authority to do so.

Petitioner seems to assume that the question of whether a civil court may re-weigh the evidence underlying the decision of a military court-martial has never been determined by this Court. In fact, however, the Court has consistently held in a long line of decisions that civil courts can consider only whether a court-martial tribunal had jurisdiction over the person and the offense and, consequently, whether its sentence was void because of an absolute want of power. *Fowler v. Wilkinson*, 353 U.S. 583; *Whelchel v. McDonald*, 340 U.S. 122; *Hiatt v. Brown*, *supra*, 339 U.S. 103; *Carter v. McClaughry*, 183 U.S.

Indeed, it is doubtful that a civil court may even inquire into the validity of a court-martial conviction except where the question is raised by application for a writ of habeas corpus. See Brief for the United States in Opposition, *Kricoski v. United States*, No. 533, O.T. 1956, pp. 9–11.

365. Conversely, this Court has repeatedly stated that the sufficiency of the evidence in a court-martial cannot be re-examined. *Burns* v. *Wilson*, 346 U.S. 137, 144; *Whelchel* v. *McDonald*, *supra*, 340 U.S. at 124; *Hiatt* v. *Brown*, *supra*, 339 U.S. at 110.[7] Moreover, in the instant case, petitioner is asking examination of the sufficiency of the evidence, not in an action attacking the conviction as in an application for a writ of habeas corpus, but rather in a suit for back pay.[8]

---

[7] Petitioner attempts to raise his argument concerning sufficiency of the evidence to an issue of constitutional stature by contending that, since the decision of the court-martial was against the weight of the evidence, he was therefore denied due process of law (Pet. 19–22). The above cases, however, implicitly recognize, in refusing to reexamine the evidence in court-martial cases, that a wrong decision on the merits does not constitute a denial of due process of law if a full and fair hearing has been provided. See also *United States* v. *Gallagher*, 183 F. 2d 342, 345 (C.A. 3), certiorari denied, 340 U.S. 913.

[8] In the event that certiorari should be granted, the Government would also argue, as it did in the court below, (1) that petitioner's claim is barred by the six-year limitation in the jurisdictional statute of the Court of Claims (28 U.S.C. (Supp. IV) 2501; see *Mistretta* v. *United States*, 128 Ct. Cls. 41), and (2) that, if petitioner establishes liability on the part of the Government, the United States is entitled to an offset in the amount of the petitioner's outside earnings during the period of his claim. *Borak* v. *United States*, 78 F. Supp. 123 (Ct. Cls.); *Kaufman* v. *United States*, 93 F. Supp. 1019 (Ct. Cls.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
MARK R. JOELSON,
Attorneys.

AUGUST 1959.

APPENDIX

Article 8 of the 1920 Articles of War, 41 Stat. 788, 10 U.S.C. 1479 (1940 ed.) provides in part:

> ART. 8. GENERAL COURTS-MARTIAL.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.
>
> * * * * *

Article 17 of the 1920 Articles of War, 41 Stat. 790, 10 U.S.C. 1488 (1940 ed.) provides:

> ART. 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel and

assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

Article 64 of the 1920 Articles of War, 41 Stat. 801, 10 U.S.C. 1536 (1940 ed.) provides:

> ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

War Department Technical Manual TM 27–255, *Military Justice Procedure*, paragraph 53a, provides:

> 53. COURTS APPOINTED BY "ACCUSER" OR "PROSECUTOR." a. *General and special courts-martial.* An accused may not be tried by a general or special court-martial appointed by the "accuser," that is, the one who originates, adopts, or becomes responsible for the charge, of the "prosecutor," that is, the one who proposes or undertakes to have the charges tried, in the case. (See AW 8, 9) An officer who has himself signed and sworn to the charges is always an accuser (par. 60, MCM) and any officer, who, because of his personal feeling or interest in charges preferred by another, adopts them as his own or undertakes to have them tried is an accuser or prosecutor (pars. 5, 60, MCM). The mere forwarding of charges with a formal recommendation as to their disposition does not make the forwarding officer either an accuser or prosecutor. Every officer exercising court-martial jurisdiction must make a recommendation as to the disposition of charges submitted to him before they are referred for trial. Mere fulfillment of this official duty does not disqualify him from acting as an appoint-

ing authority. If the officer who appointed a general or special court is the accuser or prosecutor in a particular case, the case cannot be tried by his court. For example, if a division commander had preferred charges, the accused could not be tried by a general or special court-martial appointed by him. The charges would have to be tried by a special or general court appointed by superior authority—e.g., the corps commander. The fact that an appointing authority is an accuser or prosecutor as to charges in one case does not, of course, mean that a general or special court appointed by him cannot try other cases in which he is not the accuser or prosecutor.

U.S. GOVERNMENT PRINTING OFFICE 1959